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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1341

LEON VINCENT, Superintendent of Green Haven Correctional Facility,

Petitioner,

against

EFRAIN SANTIAGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-7657

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
A. Introduction	3
B. The Murder of Manuel Perez, Jr., and the Arrest of Respondent	3
C. Events Prior to Trial and the Trial	5
D. The State Appeal	7
E. The Federal Application	8
REASONS FOR GRANTING THE WRIT:	
A. The Writ Should Be Granted Because The Mandate Below Undermines The Rule That An Applicant Attacking A State Court Conviction Must Show Fundamental Unfairness To Prevail In A Federal Habeas Corpus Proceeding	9
B. The Court Below Misapplied *Davis* v. *Alaska*, 415 U.S. 308 (1974), and undermined the principle of the finality of criminal judgments	12
Conclusion	15
Appendix A—Opinion	1a

TABLE OF CASES	PAGE
Cupp v. *Naughton*, 414 US 141 (1973)	9
Davis v. *Alaska*, 415 US 308 (1974)	12
Harris v. *United States*, 371 F.2d 365 (9th Cir. 1967)	11
Henderson v. *Kibbe*, 431 US 145 (1977)	10
Lisenba v. *California*, 314 US 219 (1941)	9
Matter of Bateman, 145 NY 623, 40 N.E. 10 (1895)	11
United States v. *110 Bars of Silver*, 508 F.2d 799 (5th Cir. 1975), *cert. den.*, 423 US 861 (1975)	10
US ex rel. Stanbridge v. *Zelker*, 514 F.2d 45 (2d Cir.), *cert. den.*, 423 US 872 (1975)	10
Wainwright v. *Sykes*, 433 US 72 (1977)	13

OTHER AUTHORITIES

Fisch On New York Evidence, 2d Ed. §16 (1977)	11

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Petitioner prays for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit dated December 19, 1977.

Opinions Below

On November 30, 1976, the United States District Court for the Southern District of New York granted respondent's application for a writ of habeas corpus. The opinion is reported at 423 F. Supp. 103. It appears as Appendix A. On February 22, 1977, the United States Court of Appeals for the Second Circuit affirmed the order of the District Court on the opinion of the District Court. A

copy of this order is appended as Appendix B. On June 6, 1977, the Circuit Court granted the petition for rehearing and remanded for a hearing to the District Court. A copy of the order is appended as Appendix C. On September 12, 1977 the District Court, after a hearing, again granted the application. The opinion is unreported and appears as Appendix D. On December 19, 1977 the Court of Appeals affirmed the order of the District Court on the opinions of the District Court. The order is appended as Appendix E*.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

Questions Presented

1. Did the Circuit Court err in reversing a state murder conviction on the basis of an allegedly erroneous evidentiary ruling during cross-examination of a prosecution witness where the Court did not evaluate the ruling in the context of the entire proceeding as required by fundamental principles of habeas corpus review?

2. Is a state criminal proceeding fundamentally unfair because a trial court makes evidentiary rulings based on the trial strategy developed in the trial court and not on a strategy developed in the appellate court for the first time?

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*On January 27, 1978, the Circuit Court denied petitioner's petition for reargument. On Feb. 21, 1978, the Circuit Court granted petitioner's application for a stay of the mandate in accordance with F.R.A.P. 41 (b).

Statement of the Case

A. Introduction

Respondent is serving a state prison term for murder. The sole claim raised by respondent in his habeas corpus application was that the trial court's refusal to permit questions on cross examination of a prosecution witness, Mildred Crespo, about her brother's questioning by the police with reference to the homicide to show her interest in the case deprived him of his right of confrontation at trial.

It is petitioner's contention that this was not the purpose of the questions put to Mildred Crespo about her bother, Pee Wee Crespo, and that, in any event, on the record as a whole, the proceedings against respondent complied with due process.

B. The Murder of Manuel Perez, Jr. and the Arrest of Respondent

On December 16, 1971, just before midnight, Manuel Perez, Jr. was murdered in the hallway, just outside the third floor apartment, at 327 Melrose Avenue, Bronx, New York. The entire crime was witnessed first hand by Isabel Alvarez through the peephole of her apartment door. Mrs. Alvarez saw the man grab another by the collar while holding a knife in his right hand. She heard the victim plead for his life, state that he had only three dollars and saw the assailant plunge the knife into the man's left chest area and throw him on the stairs. (T. 485-489, 503-509, 516-517, 529, 531-532, 607).*

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* Numbers in parentheses preceded by T refer to pages of the trial transcript; numbers preceded by H refer to the hearing in the District Court.

After witnessing the stabbing, Mrs. Alvarez ran to her window, shouted to her upstairs neighbors and alerted them to the occurrence in the hallway. (T. 510)

Upon hearing her screams, Myrna Crespo, a twenty-three year old college student, went out to the hallway. She saw the aggressor hold his victim against the wall and then throw him on the staircase. She heard the victim plead for mercy as the assailant said, "Shut up . . . I am going to kill you." (T. 618-624, 630)

Mildred Crespo existed from the apartment as her sister was returning. Mildred leaned over the railing and observed a man lying on the stairs as another man, holding a knife, went through his pockets. (T. 706-707A)

When Mrs. Alvarez returned to the peephole, the assailant and his victim were no longer in view. Looking out of her window, Mrs. Alvarez saw the assailant walk out of the building and turn the corner. (T. 514-515)

Sometime after the police arrived and the body had been removed from the building, Mrs. Alvarez went upstairs to the Crespo apartment. At approximately 1:00 A.M., December 17, 1971, Detective Hughes, who was in charge of the investigation, and other police officers arrived, and Mrs. Alvarez gave them a description of the assailant. She also told the officers that she had seen the assailant earlier that same day. Both Mildred and Myrna Crespo were in the apartment when Mrs. Alvarez spoke and described the attacker to the police (T. 487, 542-552, 594, 598)

Detective Hughes also spoke to Myrna and Mildred Crespo. Mildred gave him a description of the assailant either that night or later that morning, after 8:00 A.M., when he returned to the scene. He also spoke to Isabel Alvarez that day and learned that the assailant's name was Frankie. She had described the assailant to her common law husband, Benjamin Perez, later in the morning, after

the homicide. He recognized the man as a Frankie who he knew from the neighborhood. (T. 763-776, H. 35-36)

The following morning, December 18, 1971, Saturday, Detective Hughes again returned to Melrose Avenue. He spoke to Pee Wee Crespo, the brother of Myrna and Mildred and Benjamin Perez either at Melrose Avenue or the police station. He was aware that Perez knew Frankie at this time. He asked their help in locating Frankie (H. 13-16)

That night, at approximately 11:00 P.M., the Crespo sisters saw the assailant in front of their building. They told their brother. He contacted the police and Efrain ("Frankie") Santiago, the respondent, was arrested for murder. (T. 665-678, 732-726, 761-762)

C. Events Prior to Trial and the Trial

Respondent was represented by Howard Getz, Esq. Prior to trial, on February 15, 1973, Mr. Getz went to the Crespo apartment with his secretary, Carmen Simeonides. He saw Pee Wee, Myrna and Mildred Crespo. He had been informed prior to this visit, possibly by Isabel Alvarez, that Pee Wee Crespo had either been arrested, taken into custody or asked questions about the homicide. He asked Pee Wee if he had been arrested. He said "No", but he told Mr. Getz that he was requested to come to the police station and was asked questions about the homicide (H. 90-91).

The trial began on February 26, 1973.* Isabel Alvarez, Myrna Crespo, Mildred Crespo and Detective Hughes testified, among others, at respondent's trial.

Isabel Alvarez was the main witness for the People. She identified the respondent as the assailant. She had seen him through the peephole and recognized him as the assailant from seeing him on two other occasions in front of her

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* Pretrial hearings began on February 13, 1973.

building. Mr. Getz cross-examined her at length in an effort to show that she had insufficient opportunity and lighting through the peephole to identify the respondent as the assailant. He did not ask her any questions about Pee Wee Crespo.

Myrna Crespo also identified the respondent. Mr. Getz cross-examined her and tried to show that her identification of the respondent was based on an insufficient opportunity to observe the assailant in the hallway. He did not ask her any questions about Pee Wee Crespo.

Mildred Crespo was the next witness to testify. She also identified the respondent. Mr. Getz also attempted to test her ability to see the assailant after the stabbing and identify the respondent as that man. He then went on to ask her the following questions:

"Q. You have a brother by the name of Pee Wee?
A. Yes.
Q. And did you learn between the time of the night of the incident and the time you spoke with Detective Hughes for the first time that Pee Wee had been arrested for this homicide?

Mr. Gilleece: Oh, I object to this question. I asked her if she learned it. If she didn't learn it, she could say no.
The Court: Did you ever hear that?
The Witness: That he was arrested? No.

Q. Did you learn he was taken to the station house about this incident?

Mr. Gillece: Hold on. I object to this now.
The Court: Sustained.
Mr. Getz: That's a term of legal art, Judge.
The Court: No it's sustained.
Mr. Getz: If the Court please, it's a term of legal art.

• • •

Q. Did your brother ever tell you that he had been taken to the station house to be questioned with reference to this homicide?

Mr. Gilleece: Objection.
The Court: Sustained.
Mr. Getz: No further questions.

(T 730-732)."

Detective Hughes was the final witness for the people. Getz cross-examined him about the various descriptions he had received of the assailant. He did not ask him any questions about Pee Wee Crespo.

The jury found the respondent guilty of murder and possession of a weapon as a misdemeanor. He was sentenced to an indeterminate term of imprisonment for life with a minimum period of imprisonment of eighteen years on the murder count and for a one year concurrent sentence on the possession count.

D. The State Appeal

On appeal, respondent was represented by a new attorney, Barry Basis, Esq. So far as the record shows, Mr. Basis never spoke to or interviewed Mr. Getz or any of the trial witnesses prior to preparing the brief on appeal. On the basis of the trial record, respondent argued in the New York Supreme Court, Appellate Division, First Department, *inter alia*, that the trial court's refusal to allow defense counsel to attempt to show through cross-examination of Mildred Crespo that her brother's arrest for the murder provided both the witness and her sister, Myrna, with a motive to falsify their testimony had denied him his right of confrontation. On June 3, 1975, the Ap-

pelate Division affirmed the murder conviction, reversing the possession conviction. Leave to appeal to the New York Court of Appeals was denied on May 19, 1975.

E. The Federal Application

In its first opinion, the District Court held that the trial court's failure to allow further inquiry on the subject of Mildred Crespo's bias stemming from her knowledge of her brother's arrest deprived respondent of his right of confrontation. The Court stated there was a good faith basis for the cross-examination and that the trial court should have been aware of the basis for the questions merely because Isabel Alvarez had testified at a pretrial *Wade* hearing, ten days earlier, that a Pete or Gustav Crespo, had been taken to the station house although it was of no relevance to the identification issue before the trial court at that time.

Although Mildred Crespo was the third witness to identify the defendant, the District Court went on to conclude that her testimony was a "crucial link" in the conviction of Efrain Santiago and that knowledge of her brother's arrest for the offense could have seriously undercut her credibility as a government witness. The Court ordered that respondent be discharged from custody unless the State of New York accord him a new trial within 60 days of the issuance of the District Court mandate.

On February 22, 1977, the Circuit Court affirmed the District Court judgment on the opinion of the District Judge. Petitioner moved for reargument claiming, *inter alia,* that the trial record was insufficient to establish any prejudice to respondent because he was not permitted to cross-examine Mildred Crespo further. On June 6, 1977, the Circuit Court granted the petition for rehearing, withdrew the order affirming the judgment without prejudice and remanded the case to the District Court for a hearing.

Detective Hughes, Mildred Crespo, Myrna Crespo, Isabel Alvarez and Benjamin Perez, testified at the hearing. Detective Hughes stated Pee Wee Crespo was never a suspect. Mildred and Myrna Crespo testified they were never told nor did they believe their brother was a suspect.

The District Court, after the hearing, again granted the writ. The Court characterized the key question requiring the Court to reopen the application as whether, in fact, there was any good faith basis for inquiring into Mildred Crespo's possible bias or motive to falsify her testimony because of her thinking that her brother had been arrested or was a suspect in the investigation of the murder in question. The District Court did not find that this was, in fact, the reason for the inquiry. The Court, finding that there was a good faith basis for the cross-examination of Mildred Crespo ordered the issuance of a writ of habeas corpus.

REASONS FOR GRANTING THE WRIT

A. The Writ Should Be Granted Because The Mandate Below Undermines The Rule That An Applicant Attacking A State Court Conviction Must Show Fundamental Unfairness To Prevail In A Federal Habeas Corpus Proceeding.

Respondent, a state prisoner, sought to overturn his conviction on the claim that he was denied his right of confrontation during his state court trial by a ruling of the trial court which sustained an objection to a question asked of a prosecution witness. For this purpose, he mounted a collateral attack on his judgment of conviction by means of a federal habeas corpus petition in the District Court. In that application, respondent bore the burden of demonstrating error of such dimension that the fundamental fairness of the entire state court proceeding was infected by the trial court's ruling. *Lisenba* v. *California,* 314 U.S. 219 (1941).

The court below, although citing cases that reflect the appropriate standard, e. g., *Cupp* v. *Naughton,* 414 US 141

(1973), and *US ex rel. Stanbridge* v. *Zelker,* 514 F.2d 45 (2d Cir.), *cert. den.,* 423 US 872 (1975), actually looked at the few questions put to Mildred Crespo near the conclusion of respondent's trial in isolation and failed to review the entire trial record for error of the requisite magnitude for habeas corpus relief. The District Court stated:

> "The fact that other witnesses were not questioned as to their knowledge of Pete Crespo's arrest does not eliminate the constitutional violation of cutting-off of cross examination of Mildred Crespo." (A. 9-10)

It appears further that the Court below was substituting itself for the trial judge whose rulings even on a direct federal appeal "will not be disturbed absent a clear showing of an abuse of discretion." *United States* v. *110 Bars of Silver,* 508 F.2d 799, 803 (5th Cir. 1975), *cert. den.,* 423 US 861 (1975).

Of course, this being a collateral attack, even more is required:

> "The strong interest in preserving the finality of judgments, . . . as well as the interest in orderly trial procedure must be overcome before collateral relief can be justified. For a collateral attack may be made many years after the trial when it may be impossible, as a practical matter to conduct a retrial." *Henderson* v. *Kibbe,* 431 U.S. 145, 154 n. 13 (1977).

The yardstick for measuring the challenge to respondent's state conviction is whether the state proceeding observed "that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California, supra* at 236.

The record below clearly establishes that the proceedings against respondent were fair and just and that in no sense was he denied due process of law. Moreover, not even reversible error was committed by the trial court.

New York law required petitioner's question to Mildred Crespo, having been objected to, to be explained:

> "A ruling which sustains an objection to the offer of a seemingly irrelevant or immaterial proposition cannot be made the ground for appellate review absent a statement of the purpose of the offer by the proponent." *Fisch On New York Evidence,* 2d Ed. § 16 (1977).

See Matter of Bateman, 145 N.Y. 623, 40 N.E. 10 (1895). This is the same rule of law that applies in the federal courts. *Harris* v. *United States,* 371 F.2d 365, 366 (9th Cir. 1967).

At bar, the questions asked of Mildred Crespo in the context of respondent's trial were seemingly irrelevant, and counsel offered no explanation for the inquiries. Indeed, the record makes clear that the explanation offered for the questions by respondent on appeal was never even contemplated by his trial counsel.

Defense counsel had interviewed Pee Wee, Myrna and Mildred Crespo well in advance of trial. He had been apprised of Pee Wee's meeting with Detective Hughes. Respondent was the only suspect in the homicide as trial counsel knew, having learned it from Pee Wee Crespo himself. When his questions to Mildred Crespo were objected to, he made no claim that they were designed to show bias or motive to lie on her part.

Trial counsel had obviously made assessments of the Crespos' credibility, and he did not believe a jury would find that these sisters, of unblemished character, were liars. He rather adopted a course of showing them mistaken in their identification of respondent as the assailant. In the context of the case as it developed, it is apparent that the questions asked of Mildred Crespo were simply designed to show that the descriptions of the assailant given to Detective Hughes were so inconclusive that individuals in addi-

tion to respondent had been questioned about the homicide. The questions called for a hearsay response and were ruled improper.

In short, the failure of the Court below to evaluate the contested ruling in the context of the entire trial from a standpoint of fundamental fairness did a disservice to the basic principles governing the application of the due process clause and the tenets underlying habeas corpus jurisdiction and led to an erroneous result. This decision should be examined because it establishes bad precedent for review of challenged evidentiary rulings in federal habeas corpus.

B. The Court Below Misapplied *Davis* v. *Alaska*, 415 U.S. 308 (1974) and undermined the principle of the finality of criminal judgments.

In addition to applying the wrong standard to respondent's application, the Court in its opinion below erroneously extended the principles of *Davis* v. *Alaska*, 415 U.S. 308 (1974).

Petitioner, in *Davis*, was convicted of grand larceny and burglary. He was arrested on the strength of his identification by a Richard Green. Green was the prosecution's only identification witness at trial. At the time of the trial, Green was on probation for burglary by order of a juvenile court. The trial court was informed by defense counsel that he intended to bring out Green's probationary status to show that Green identified the petitioner out of fear of possible jeopardy to his probation and that he was a biased and prejudiced witness. The prosecutor opposed this line of questioning because of statutes in Alaska which limit the use of juvenile records. The Court sustained the objection.

Unlike *Davis*, at bar, the reason for the questions asked of Mildred Crespo was never explained to the trial judge. The Court below passes the burden to the trial court of

guessing at the meaning of the questions asked of the witness. This tactic was specifically rejected by this Court in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). To extend *Davis* this way is to open to challenge any conviction where some ground to sustain the validity of a question asked of a prosecution witness on cross-examination can be suggested on appeal notwithstanding that such basis for the question was not even contemplated by trial counsel, let alone advanced as a justification for the question.

This is counter to this Court's recent expression of concern in *Wainwright* v. *Sykes*, *supra* at 90, that a defendant's initital trial "on the merits be the 'main event' so to speak" and that trial the place where constitutional claims are aired.

> "A defendant has been accused of a serious crime and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest possible extent all issues which bear on this charge should be determined in this proceeding: The accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. *Any procedural rule which encourages the result that those proceedings be as free of error as possible is throughly desirable . . .*" (emphasis supplied).

Finally, the Court below has extended *Davis* to a witness who at best, "may have thought" her brother was a suspect• (A20) and whose testimony was cumulative.

• Petitioner believes this finding to be contrary to undisputed evidence at the habeas corpus hearing. Mildred testified re-

(footnote continued on following page)

Isabel Alvarez viewed the entire murder through a peephole in her door. She immediately recognized the aggressor as a man she had seen on two prior occasions in front of her building. Respondent made no attempt to conceal his identity. He wore no mask. When arrested by the police, he admitted being at the scene at the time of the murder.

Myrna Crespo also saw respondent and identified him at trial. Admittedly, no attempt at trial was ever made to show bias or motive to lie on her part.

Further, neither Mildred nor Myrna had any reason to believe their brother was a suspect. They had heard Isabel Alvarez, the main witness to the stabbing, describe someone else as the assailant to the police.

The Court below has unwisely extended this Court's holding in *Davis*. The principles of finality of criminal litigation require that this extension be examined and disapproved.

(footnote continued from preceding page)

peatedly at the habeas corpus hearing that she did not believe her brother to be a suspect. Detective Hughes confirmed that he was not. Moreover, Mildred had already given a description of the respondent to Detective Hughes before the detective even spoke to her brother.

CONCLUSION

The Court should grant the petition for writ of certiorari and summarily reverse the decision below, or in the alternative, grant plenary consideration to the instant appeal.

Dated: New York, New York
March 21, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
Of Counsel

APPENDIX A

Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 3225

UNITED STATES OF AMERICA, ex rel. EFRAIN SANTIAGO,
Petitioner,
—against—
LEON VINCENT, Superintendent of Green Haven Correctional Facility,
Respondent.

APPEARANCES

WILLIAM E. HELLERSTEIN
WILLIAM J. GALLAGHER
Attorneys for Petitioner
15 Park Row
New York, New York 10038

BARRY BASSIS, Esq.
Of Counsel
LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Two World Trade Center
New York, New York 10047

RHONDA AMKRAUT BAYER, Esq.
Deputy Assistant Attorney General
Of Counsel

Opinion.

GAGLIARDI, D. J.

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner was convicted after a jury trial in New York Supreme Court, Bronx County of common law murder and possession of a weapon. On April 5, 1973, petitioner was sentenced to an indeterminate term of imprisonment of 18 years to life on the murder charge to run concurrently with a one year sentence for the weapon possession charge. The Appellate Division, First Department, affirmed the murder conviction and the sentence therefor, but reversed the conviction for possession of a weapon and vacated the sentence on that charge. Appellate Division Order, April 3, 1975. Leave to appeal was denied by a judge of the Court of Appeals (May 19, 1975). The petitioner is now serving his sentence at the Green Haven Correctional Facility.

The sole issue in this petition is whether the trial court's refusal to allow cross-examination of a prosecution witness on the subject of her interest in the case deprived petitioner of his right of confrontation guaranteed by the Sixth and Fourteenth Amendments and thus requires the reversal of his conviction. This issue was fully briefed and argued before the Appellate Division and in the petition for leave to appeal to the Court of Appeals. Petitioner has exhausted his available state remedies. *See Picard* v. *Connor,* 404 U.S. 270, 275, 278 (1971); *Chesney* v. *Robinson,* 403 F. Supp. 306, 308 (D. Conn. 1975), *aff'd on opinion below,* 538 F.2d 308 (2d Cir. 1976).

After thoroughly reviewing the record in this case, for the reasons stated herein, this court finds petitioner's confrontation rights guaranteed by the Sixth and Fourteenth Amendments were violated when cross-examination was limited and, accordingly, grants the writ.

On December 17, 1971 at 12:15 A.M. a New York City Police patrolman, in response to waves from a crowd

Opinion.

and to a police radio communication, entered a building at 827 Melrose Avenue, Bronx County, New York. This building is the residence of the three key witnesses in this case. Between the first and second floor landing of the building the patrolman saw the victim of the crime in this case, Manuel Perez, Jr., sitting in a slumped position. From the stairway the victim was removed to Morrisania Hospital. According to the testimony of the Medical Examiner of the City of New York, the victim had died shortly after he had sustained multiple stab wounds.

At the trial the prosecution relied heavily upon the testimony of three witnesses. The first of these witnesses, Isabel Alvarez, the only eyewitness to the murder, looked out of the peephole in the door of her apartment and saw the knife penetrate the victim. Myrna Crespo, who testified after Isabel Alvarez, stated that she responded to the cries of Isabel Alvarez, came out into the hallway of her fourth floor apartment and saw the perpetrator and the victim on the landing below. She stated that the perpetrator had a knife and was going through the pockets of the victim, and that she saw the perpetrator's face for a short period of time. The next witness, Myrna's sister Mildred Crespo, an occupant of the same fourth floor apartment, testified that she went out of the apartment as her sister was returning and also saw the perpetrator and the victim on the landing below. She too stated that the perpetrator had a knife and was going through the victim's pockets. She also testified that she saw the perpetrator's face for a few seconds. The only other witnesses at the trial were the policeman who found the body and the father of the victim who both testified before Isabel Alvarez and the medical examiner and the police detective in charge of the investigation of the murder who testified after Mildred Crespo.

It was at the end of the cross-examination of Mildred Crespo that the petitioner alleges the Sixth and Fourteenth Amendment confrontation violation took place. Petitioner claims that the cutting-off of cross-examination denied him the opportunity to establish that Mildred Crespo's knowledge of her brother's arrest for the very crime for which the petitioner was on trial gave her a motive to falsify her testimony. The sustaining of the prosecutor's objections in the following exchange [T. 730-32][1] petitioner alleges, was a constitutional violation requiring reversal of petitioner's conviction:

The Court: Anything further?

Q. You have a brother by the name of Peewee?

A. [Mildred Crespo] Yes.

Q. And did you learn between the time of the night of the incident and the time you spoke with Detective Hughes for the first time that Peewee had been arrested for this homicide?

Mr. Gilleece: Oh, I object to this question.

Mr. Getz: I asked her if she learned it. If she didn't learn it, she could say no.

The Court: Did you ever hear that?

The Witness: That he was arrested? No.

Q. Did you learn he was taken to the station house about this incident?

Mr. Gilleece: Hold on. I object to this now.

The Court: Sustained.

Mr. Getz: That's a term of legal art, Judge.

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[1] [T.] refers to the page in the transcript of the criminal proceeding against Efrain Santiago. Pages 1-58 refer to the *Huntley* hearing, pages 59-359 refer to the *Wade* hearing and pages 360-929a refer to the trial.

The Court: Not [sic] it's sustained.

Mr. Getz: If the court pleases, it's a term of legal art.

The Court: Now, sir, I don't know where you learned English, but I learned it here in the United States, and it requires me to say certain things and you to understand them. I have said to you five times today if I have said it once, I don't want argument after I have made a ruling.

Mr. Getz: Well, Judge—

The Court: Is that clear enough?

Mr. Getz: Yes, sir.

The Court: Now, don't reply to it. Put your next question.

Mr. Getz: Judge, if the other witness—

The Court: Just put your next question.

Mr. Getz: Obviously, if the other witness had a problem with English, this witness has a problem with English.

The Court: Would you be seated now.

The Court: Don't you hear what I say to you or are you so anxious to talk?

Mr. Getz: I hear you, sir.

The Court: You heard me say to you to put the next question. Do you have another question to put, Counselor?

Mr. Getz: Yes.

By Mr. Getz:

Q. Did your brother ever tell you that he had been taken to the station house to be questioned with reference to this homicide?

Mr. Gilleece: Objection.

The Court: Sustained.

Mr. Getz: No further questions.
Mr. Gilleece: I have no further questions.
The Court: Step down.

Federal court review of state criminal proceedings under 28 U.S.C. § 2254 is limited to errors of constitutional magnitude. *Cupp* v. *Naughton,* 414 U.S. 141, 146 (1973); *United States ex rel. Stanbridge* v. *Zelker,* 514 F.2d 45, 50 (2d Cir.), *cert. denied,* 423 U.S. 872 (1975). Furthermore, in order to grant petitioner's habeas corpus petition and reverse his conviction, this court must find that the cutting-off of cross-examination, even if of constitutional dimension, was not harmless error beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18 (1967); *United States* v. *Duhart,* 511 F.2d 7, 10 (6th Cir.), *cert. denied,* 421 U.S. 1006 (1975).

It is well established that the scope and extent of cross-examination is within the sound discretion of the trial court. *Smith* v. *Illinois,* 390 U.S. 129 (1968); *Pointer* v. *Texas,* 380 U.S. 400 (1965). However, it is equally well established that the right of cross-examination is a fundamental one grounded in the Sixth Amendment right of an accused to confront the witnesses against him. *Davis* v. *Alaska,* 415 U.S. 308 (1974); *Chambers* v. *Mississippi,* 410 U.S. 284, 294-95 (1973); *Pointer* v. *Texas, supra.* This fundamental right is made obligatory on the states by the due process guarantees of the Fourteenth Amendment. *Pointer* v. *Texas, supra* at 403.

When a government witness in a criminal case is being questioned as to his possible motives for testifying falsely, wide latitude should be allowed in cross-examination. *United States* v. *Masino,* 275 F.2d 129, 132 (2d Cir. 1960). Indeed, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis* v. *Alaska, supra* at 316;

United States v. *Harris,* 501 F.2d 1, 8 (9th Cir. 1974). Cross-examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined. *See Greene* v. *McElroy,* 360 U.S. 474, 496 (1959); *United States* v. *Lester,* 248 F.2d 329, 334-35 (2d Cir. 1957). Thus, while the trial judge has wide latitude in the control of cross-examination, "this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." *United States* v. *Harris, supra* at 8, quoting *Gordon* v. *United States,* 344 U.S. 414, 423 (1953).

A careful review of the over 900 page record in this case establishes that petitioner was denied his Sixth and Fourteenth Amendment rights to adequate cross-examination at his trial. In the cross-examination at issue, Mildred Crespo did answer, over the prosecutor's objection, that she did not know her brother had been arrested [T. 730]. However, this single denial was not enough to allow the court to deny further cross-examination intended to discredit the testimony of a prosecution witness. Throughout the trial the court recognized that all three key witnesses, questioned and testifying through an interpreter, had trouble understanding and answering questions [T. 189, 239, 535, 604]. Additionally, even the prosecutor, at an earlier point in the proceeding, recognized that the term "arrest" is a legal term subject to misunderstanding.[2] The trial court had to allow further inquiry on the critical subject of Mildred Crespo's bias stemming from her knowledge of her brother's arrest unless that line of questioning had no reasonable basis in fact. *See United States* v. *James,* 510 F.2d 546, 551 (5th Cir. 1975), *cert. denied,* 423 U.S. 855 (1976);

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[2] MR. GILLEECE [Prosecutor]: Objecting at this point, because counsel has been objecting to conclusions—arrest is a conclusion. It has a constitutional meaning, it has a statutory meaning and it has a civilian meaning. [T. 41-42]

United States v. *Rich*, 262 F.2d 415, 418 (2d Cir. 1959); *United States* v. *Bender*, 218 F.2d 869, 874 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955).

The good faith basis for the questioning of Mildred Crespo came from the cross-examination of Isabel Alvarez at the *Wade* hearing in the case which took place two weeks prior to the trial. The trial judge also presided at the *Wade* hearing:

> Q. And after that, or before that, did Benjamin Perez [Isabel Alvarez's common-law husband] tell you that he had been brought to the 42nd Precinct with reference to questioning on this particular homicide?
>
> The Interpreter: Can you simplify that?
> Mr. Getz: All right.
>
> Q. Before he told you the man's name was Frankie, or after he told you the name was Frankie,—
>
> Mr. Getz: Let me finish the question I haven't finished the question.
> The Interpreter: I know. I'm waiting.
>
> Q. Either before or after, did Benjamin Perez tell you that he had been taken to the 42nd Precinct with reference to questioning on this particular homicide?
> A. [Isabel Alvarez] I don't know, I know that after he was arrested, they came to look for me. It was after two o'clock in the morning.
> Q. After your husband was arrested?
> A. After they arrested my husband's friend.
>
> The Court: Who is your husband's friend?
> The Witness: Pete Crespo, Gustav Crespo [Peewee]. He is brother to the other witness who will appear here.
>
> Q. He is the brother to the other witness. And did Benjamin Perez tell you that he was also taken to the

> station house with reference to this particular homicide?
> A. They were going to take him to the station house but then they took this Crespo.
> Q. So far as you know your husband was never taken to the station house?
> A. No.
>
> [T. 180-81]

While defense counsel never approached the bench to assert this good faith basis by means of a formal offer of proof during the trial, the testimony of Isabel Alvarez at the *Wade* hearing, *supra;* the proximity in time of the *Wade* hearing to the trial; and the fact that the same judge presided at both constituted sufficient notice to the trial judge of the circumstances underlying defense counsel's proffered questioning of Mildred Crespo at the trial. This combination of circumstances provided an effective offer of proof. Additionally, while the record does not evidence a clear intent by defense counsel to make an offer of proof at trial, the abrupt manner in which the trial court cut-off any attempted explanation by counsel at the trial precluded the possibility of a formal offer of proof to establish a good faith basis for the questioning. *See United States* v. *James*, *supra*. The fact that other witnesses were not questioned as to their knowledge of Pete Crespo's arrest[3] does not

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[3] Because of the decision herein, the court need not decide whether the failure of the defense attorney to question other prosecution witnesses on their bias with respect to this issue constituted a denial of the effective assistance of counsel. *See United States* v. *Moore*, 529 F.2d 355 (D.C. Cir. 1976). For example, the fact that Isabel Alvarez thought her common-law husband was going to be arrested but they arrested his friend Pete Crespo instead [T. 180-81] gave her a possible motive to falsify her testimony. However, a failure to explore this motive at trial does not affect the unconstitutionality of the denial of cross-examination of Mildred Crespo on the issue of her bias in testifying.

eliminate the constitutional violation of cutting-off of cross-examination of Mildred Crespo. As a result, the trial judge's actions denied petitioner his Sixth and Fourteenth Amendment constitutional rights. *See Davis* v. *Alaska, supra.*

The restriction placed upon the right to cross-examine Mildred Crespo was not harmless error beyond a reasonable doubt. *See United States* v. *Harris, supra* at 9. This court is not required to find that the trial would have had a different result had the petitioner been allowed to carry out his cross-examination. *Chesney* v. *Robinson, supra* at 310. As Chief Justice Burger stated for the Court in *Davis* v. *Alaska, supra* at 317:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided *"a crucial link in the proof . . . of petitioner's act."* *Douglas* v. *Alabama,* 380 U.S., at 419. (emphasis added).

There can be no doubt that the testimony of Mildred Crespo was "a crucial link" in the conviction of Efrain Santiago and that presentation to the jury of her knowledge of her brother's arrest for the offense for which Santiago was being tried could have seriously undercut her credibility as a government witness.[4] While Mildred Crespo was not an eyewitness to the actual stabbing the court

[4] This does not even take into account how the testimony may have inferentially affected the jury's judgment on the credibility of Myrna Crespo. Myrna Crespo had the same interest as Mildred in exculpating her brother.

specifically provided a supplemental circumstantial evidence charge so that in the event the jury did not find Isabel Alvarez's testimony credible it could still convict Efrain Santiago for murder [T. 915-22]. The prosecutor's summation is an indication of how important Mildred Crespo's testimony was for the State. Conceding to the jury that Isabel Alvarez was uneducated, inarticulate and may have been a drug dealer [T. 852],[5] and that Myrna Crespo had identified photographs of two different suspects as the assailant she saw on the night of the crime [T. 838], the prosecutor relied on Mildred Crespo "who counsel [for the defense] could not even touch, no way to impeach her, no way at all." [T. 852]. Mildred Crespo was the only witness who allegedly saw Santiago both before and after the killing [T. 850]. The prosecutor specifically emphasized in summation, "You saw Mildred Crespo here. Did she have a reason to lie?" [T. 847].

Mildred Crespo's knowledge of the arrest of her brother could certainly have been a reason for her to lie.[6] Mildred Crespo and her sister did not tell the police detective in charge of the investigation who came to their apartment in the early morning, a few hours after the murder, to interview Isabel Alvarez that they too had seen the assailant. [T. 209, 267, 656, 728].[7] Only that afternoon, twelve

[5] In addition it was established earlier in the trial that Isabel Alvarez had once stabbed a man allegdly in self-defsense [T. 569].

[6] Whether Pete Crespo was in fact arrested is irrelevant. It is the subjective knowledge of Mildred Crespo that is relevant in determining bias or prejudice.

[7] The investigating detective testified at the *Wade* hearing that he had spoken to the Crespo sisters in the early morning immediately after the murder [T. 95]. However, his testimony at the trial was much less clear and he had no notes to identify that meeting. [T. 759, 765]. On the other hand, the Crespo sisters were both very clear and consistent that they did not speak to the detective until the next afternoon.

hours later, did they give their stories to the detective [T. 659, 236]. In the interim, according to the testimony of Isabel Alvarez at the *Wade* hearing, Pete Crespo had been taken to the station house with reference to this particular homicide [T. 181].

On these facts, defense counsel should have been permitted to expose to the jury, as the sole triers of fact and credibility, whatever knowledge Mildred Crespo in fact had about her brother's arrest so the jury could appropriately draw inferences relating to the reliability of the witness. *Davis* v. *Alaska, supra* at 318. On the basis of the trial court's abrupt cutting-off of cross-examination, "the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness.'"[8] *Id.*

It is the conclusion of this court that petitioner, in his trial, was denied the right to an effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart* v. *Jonis*, 384 U.S. 1, 3 [1966]." *Smith* v. *Illinois, supra* at 131, quoted in *Davis* v. *Alaska, supra* at 318; *see Chesney* v. *Robinson, supra* at 311. As a result, petitioner's conviction cannot stand. Petitioner is therefore presently in custody in violation of the Constitution of the United States. 28 U.S.C. § 2254.

It is ordered that a writ of habeas corpus should issue out of this court discharging the petitioner, Efrain Santiago, from custody unless the State of New York vacates

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[8] The prosecution's presentation of Mildred Crespo as a "blameless witness" was reinforced by the trial court's charge to the jury, "As a matter of law here there are no witnesses who can be said as a matter of law to be interest [sic] witnesses." [T. 860]

the judgment of conviction and accords him a new trial within 60 days of the issuance of the mandate herein.[9]

/s/ LEE P. GAGLIARDI
U.S.D.J.

Dated: New York, New York
November 30, 1976.

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[9] The court trying the case may extend the period for a total not to exceed 180 days from the date on which the order occasioning the retrial becomes final, where unavailability of witnesses or other factors resulting from passage of time shall make trial within 60 days impractical. *United States ex rel. Washington* v. *Vincent*, 525 F.2d 262, 268 n. 10 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1147 (1976).

APPENDIX B

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of February, one thousand nine hundred and seventy-seven.
Present:

HONORABLE WILFRED FEINBERG

HONORABLE MURRAY I. GURFEIN

HONORABLE THOMAS J. MESKILL

Circuit Judges.

76-2172

UNITED STATES OF AMERICA
EFRAIN SANTIAGO,

Petitioner-Appellee,

—against—

LEON VINCENT, Superintendent of Green Haven Correctional Facility,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Opinion.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be it hereby is affirmed on the opinion of Judge Lee P. Gagliardi dated November 30, 1976.

Wilfred Feinberg
WILFRED FEINBERG

Murray I. Gurfein
MURRAY I. GURFEIN

Thomas J. Meskill
THOMAS J. MESKILL

Circuit Judges

APPENDIX C

Opinion.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 6th day of June, one thousand nine hundred and seventy-seven.
Present:

HONORABLE WILFRED FEINBERG

HONORABLE MURRAY I. GURFEIN

HONORABLE THOMAS J. MESKILL

Circuit Judges.

76-2172

UNITED STATES OF AMERICA
EFRAIN SANTIAGO,

Petitioner-Appellee,

—against—

LEON VINCENT, Superintendent of Green Haven Correctional Facility,

Respondent-Appellant.

Upon appellant's motion, dated March 24, 1977, for an extension of time to file a petition for rehearing, and its petition for rehearing, dated March 24, 1977, and letter dated April 25, 1977, and upon appellee's reply affirmation, dated March 30, 1977, and letter dated May 5, 1977, and upon the briefs heretofore filed in this appeal and the

court's orders dated February 22, 1977 and April 14, 1977, it is ordered that:

1. Appellant's petition for rehearing is granted;

2. The order dated February 22, 1977, which affirmed the judgment of the district court, is withdrawn without prejudice to the appeal;

3. The case is remanded immediately to the district court on the conditions set forth below;

4. Within ten days from the date of this order, appellant shall move in the District Court for the Southern District of New York to reopen the habeas corpus hearing for the purpose of presenting additional evidence;

5. Within fifteen days thereafter, appellant shall be prepared to present to the District Court the evidence it desires to place into the record;

6. In the event that the District Court adheres to its decision to grant the writ of habeas corpus, appellant shall file within one week thereafter (a) its notice of appeal to this court, and (b) a motion in this court to expedite its appeal. All proceedings in any such appeal shall be referred to the undersigned panel, if practical.

Wilfred Feinberg
WILFRED FEINBERG

Murray I. Gurfein
MURRAY I. GURFEIN

Thomas J. Meskill
THOMAS J. MESKILL

Circuit Judges

APPENDIX D

Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 3225

THE UNITED STATES OF AMERICA ex rel.
EFRAIN SANTIAGO,

Petitioner,

—against—

LEON VINCENT, Superintendent of Green Haven Correctional Facility,

Respondent.

APPEARANCES:

WILLIAM J. GALLAGHER, Esq.
THE LEGAL AID SOCIETY
Attorney for Petitioner
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
New York, New York 10007

BARRY BASSIS, Esq.
Of Counsel

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Two World Trade Center
New York, New York 10047

ARLENE R. SILVERMAN, Esq.
Assistant Attorney General
Of Counsel

Opinion.

GAGLIARDI, D.J.

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This court rendered a decision on November 30, 1976 directing the issuance of a writ of habeas corpus unless the petitioner were retried within sixty days. *United States ex rel. Santiago* v. *Vincent*, 423 F. Supp. 103 (S.D.N.Y. 1976). The Second Circuit Court of Appeals affirmed on the decision below on February 22, 1977. Upon the State's petition for a rehearing, the Court of Appeals, in an order dated June 6, 1977, withdrew its affirmance without prejudice and remanded the matter to the district court to reopen the habeas corpus hearing upon the application of the State for the purpose of presenting additional evidence.

Pursuant to the State's application following the Court of Appeals remand, this court held an evidentiary hearing on June 23, 1977 to consider the State's offer of additional evidence. The State called Detective Neil Hughes and Mildred and Myrna Crespo as witnesses. The petitioner called Howard Getz, the attorney representing Santiago at his state trial and Carmen Simeonides, Mr. Goetz's secretary, as rebuttal witnesses. Pursuant to the suggestion of the court, the hearing was reopened on June 29, 1977 for the State to present the testimony of Isabel Alvarez. Thereafter, at petitioner's request, the hearing was again reopened on July 6, 1977 to present the testimony of Benjamin Perez, Isabel Alvarez's common law husband.[1] The court, having heard the testimony of these witnesses at the hearings as mandated by the Court of Appeals, reaffirms its original decision.

The sole issue in this petition is whether the trial court's refusal to allow cross-examination of Mildred Crespo, a

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[1] Mildred Crespo, Isabel Alvarez and Benjamin Perez were questioned and testified through an interpreter.

key prosecution witness, on the subject of her interest in the case deprived petitioner of his right of confrontation guaranteed by the Sixth and Fourteenth Amendments. *Davis* v. *Alaska,* 415 U.S. 308 (1974). As a result, the key question requiring this court to reopen the hearing is whether in fact there was any good faith basis for inquiring into Mildred Crespo's possible bias or motive to falsify her testimony because of her thinking that her brother had been arrested or was a suspect in the investigation of the murder in question.[2]

The testimony at the state court trial and the hearing before this court ("the habeas corpus hearing"),[3] while not always consistent, sufficiently establishes that there was a good faith basis for believing, first, that Mildred Crespo may have thought that her brother had been arrested or was a suspect in the murder investigation and, second, that this belief existed at the time she first came forward and told the police that she could identify the assailant as a

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[2] Whether Mildred's brother, Peewee Crespo, had ever actually been arrested for the murder is not the issue in this case. Rather, it is Mildred's state of mind and her belief, whether or not true, that her brother had been arrested or was a suspect that would have been the basis for her bias and motive to testify falsely. Since Detective Hughes' testimony that to his knowledge Peewee was never arrested and was never a suspect and the testimony of Mr. Getz, Santiago's attorney, that he never found out if Santiago was actually arrested, does not affect Mildred Crespo's state of mind, such testimony is not evidence in favor of precluding inquiry into Mildred's possible bias. As in *Davis* v. *Alaska, supra* at 311, where the crucial prosecution witness may have had a belief that he was a suspect or that his probation might be revoked, the fact that those beliefs might have been erroneous did not diminish his possible bias or prejudice. *See also Azbill* v. *Pogue,* 534 F.2d 195, 196 n. 2 (9th Cir.), *cert. denied,* 429 U.S. 895 (1976).

[3] [T.] refers to the page of the transcript of the state criminal proceeding against Santiago. [H] refers to the page in the transcript of the habeas corpus hearing in this court.

man who at a later photo identification she claimed was Santiago. The timing and circumstances of these events establish a possible motive for Mildred Crespo to falsify the identification she gave to the police to exculpate her brother.

The court's determination as to Mildred Crespo's possible state of mind is based primarily on her testimony and the testimony of Isabel Alvarez and Benjamin Perez at the habeas corpus hearing. Mildred's own testimony at the habeas corpus hearing was that she never thought her brother was a suspect in the case and had never discussed with anyone or was told of his involvement in the murder [H. 74-78]. However, her testimony throughout the hearing was contradictory and unconvincing. She did indicate concern about her brother's possible involvement when she testified that she knew her brother had spoken with Detective Hughes but did not know what they had discussed [H. 75], and when in response to a question about whether her brother ever talked to her about his going down to the stationhouse, she answered, "No, he would never talk to me about his problems." [H. 111].

The habeas corpus hearing testimony of Isabel Alvarez, whose testimony at the *Wade* hearing established the good faith basis for the cross-examination of Mildred Crespo at trial, more firmly establishes Mildred's possible belief that the police thought her brother was involved in the murder. Alvarez at the habeas corpus hearing confirmed her *Wade* hearing testimony by again testfying that Peewee Crespo had been arrested for the murder in the early morning of December 17th [H. 122-124].[4] She further

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[4] Cross-Examination by Mr. Bassis [Attorney for Santiago]:

Q. Some time after you spoke to the police the first time your husband came home at 4:00 a.m., correct?

A. [Isabel Alvarez] Yes.

(footnote continued on following page)

stated that she told Mildred Crespo that day that her brother had been arrested and they talked about his arrest. The credibility of Alvarez's testimony was supported by

(footnote continued from preceding page)

Q. Who came home with him at that time?
A. Crespo.
Q. What was his whole name, Custodio?
A. Custodio [Peewee] Crespo.
Q. Did they tell you that they had been arrested by the police for the murder?
A. Yes.
Q. They told you that the police thought they had committed the murder?
Ms. Silverman [Assistant Attorney General]: Objection.
The Court: Overruled.
A. Yes.
Q. Where did Peewee go after he left your apartment?
Ms. Silverman: Objection. There is no testimony he was in her apartment.
Mr. Bassis: She said they came home together.
The Court: Ask the question.
Where was it that your husband and Custodio Crespo saw you?
The Witness: In my apartment.
Q. And that was at 4:00 a.m.?
A. Yes, when my husband returned.
Q. And do you know where Peewee Crespo went when he left your apartment?
A. He went to his sisters' house.
Q. Did you talk to his sisters later that day?
A. Yes, we talked every day. I knew them.
Q. Did they know about the arrest of their brother?
The Court: Did you talk to them about the arrest of their brother?
The Witness: Yes, we talked.
The Court: Did you tell Mildred that her brother had been arrested?
The Witnes: Yes.

• • •

Q. Did Mildred tell you how the police treated her brother?
A. Yes, they had beaten him. They had beaten them both.

the testimony of Benjamin Perez at the hearing. Perez testified that Peewee had been arrested that morning because of the death in the building. He also testified that he spoke to Mildred Crespo on the morning of Deecmber 17th, and she told him that the police had arrested Peewee and beaten him [Hearing of Perez, July 6, 1977 at 3-4]. Although Alvarez later indicated that the arrest of Peewee took place two days later, her testimony and that of all the witnesses at the hearing along with the trial tesimony indicates a sufficient likelihood that Mildred Crespo believed in the early morning of December 17th that her brother was arrested or was a suspect in the murder.

Mildred Crespo's belief then, that her brother was a suspect, preceded the time she first told the police that she could identify the assailant. The testimony establishes that Mildred Crespo did not tell the detectives who came to her apartment a few hours after the 12:15 a.m. murder on December 17, 1971[5] to interview Isabel Alvarez that she too had seen the assailant. Instead, according to her trial testimony [T. 209, 236, 726-28], she waited until the afternoon of December 17th to describe the assailant to the police and tell what she saw of the murder.[6] At the habeas corpus hearing, on direct examination, she testified that she told the detective what she had seen when he first came to her apartment [H. 58], but on cross-examination she stated that she could not remember when she told this to the police

[5] The testimony reflects some confusion about the timing of events. Because the murder occurred shortly after midnight, several of the witnesses when they identified an event as occurring on the day after the murder appeared to be talking about the same day, December 17th.

[6] Mildred's sister, Myrna Crespo, also in the apartment the detectives visited a few hours after the murder, similarly did not tell her story until later that day. Myrna had the same motive as Mildred in exculpating her brother.

[H. 63-65].[7] Detective Hughes' testimony on this point is contradictory.[8] At the *Wade* hearing he said he spoke to both Crespo sisters when he first visited their apartment a few hours after the murder [T. 94-95, 113], but at the trial he could not recall if they were in their apartment when he first visited it [T. 763-64]. Furthermore, at the habeas corpus hearing he stated that that morning only one sister, without identifying which one, had said she had seen the murder and could identify the assailant [H. 13].

Taking all this evidence into consideration, the court concludes that because of Mildred's possible state of mind at the time she first told the police that she had seen the murderer, petitioner has a good faith basis for carrying out extensive cross-examination on the issue of her bias or motive to testify falsely.[9]

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[7] Myrna Crespo's testimony at the trial and the hearing on this point is consistent. She did not tell the police that she saw the murder when they came to her apartment that night but instead gave a description later that day or the next day [T. 267, 655-56; H. 84-85].

[8] Detective Hughes testified that the case folder along with his detective's notebook on the case was missing from the police department's files. His own testimony on many of the issues raised at the trial and at the hearing, without notes to identify meetings and what was said, was often unclear or contradictory.

[9] The testimony indicated another theory to show that Mildred Crespo, prior to her talking to the police about the murder, may have had a reason to believe that her brother was a suspect or had been arrested for the murder. The hearing testimony of Detective Hughes, while contradictory, indicated that Benjamin Perez and Peewee Crespo came down or were brought down to the stationhouse at about 11:00 a.m. on December 17th [H. 16, 33-34]. Detective Hughes testified that this was for routine questioning, and even if this were true, there is no indication that Mildred Crespo knew it was routine. In fact, her state of mind, as already indicated *supra*, may have been to the contrary when she associated Peewee's going down to the stationhouse with "his problems." If Mildred thought that her brother, because he was at the stationhouse, had been arrested or was a suspect, she would have had a motive to falsify the description of the murder that she gave to the police on the afternoon of December 17th.

The Supreme Court in *Davis* v. *Alaska, supra,* 316-17, citing *Greene* v. *McElroy,* 360 U.S. 474, 496 (1959), recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." The Court discussed the strategy of a general attack on the credibility of a witness by evidence of prior criminal convictions and then stated:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. *Davis* v. *Alaska, supra,* at 316.

In this case a probing and thorough cross-examination of Mildred Crespo should have been permitted to fully develop her possible bias, because this was an example of a more particular attack relating directly to issues and personalities in the case at hand. *Accord, United States* v. *Garrett,* 542 F.2d 23, 26-27 (6th Cir. 1976).

The court, finding that there was a good faith basis for the searching cross-examination of Mildred Crespo and that her cross-examination was unconstitutionally restricted, orders the issuance of a writ of habeas corpus under the terms of its prior decision.[10]

So Ordered.

/s/

U.S.D.J.

Dated: New York, New York
September 12, 1977.

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[10] The court notes that despite the state's concern as expressed to the Court of Appeals a new trial of Efrain Santiago is certainly a possibility, the state having located Mildred and Myrna Crespo and Isabel Alvarez, the three key witnesses in the original prosecution.

APPENDIX E

Opinion.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of December, one thousand nine hundred and seventy-seven.
Present:

HONORABLE WILFRED FEINBERG

HONORABLE MURRAY I. GURFEIN

HONORABLE THOMAS J. MESKILL

Circuit Judges,

76-2172

UNITED STATES OF AMERICA ex rel.
EFRAIN SANTIAGO,
Petitioner-Appellee,
—against—

LEON VINCENT, Superintendent, Green Haven Correctional Facility,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Opinion.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinions of Judge Lee P. Gagliardi, dated September 12, 1977 and November 30, 1976.

Wilfred Feinberg
WILFRED FEINBERG

MURRAY I. GURFEIN
MURRAY I. GURFEIN

Thomas J. Meskill
THOMAS J. MESKILL

Circuit Judges